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In The

Supreme Court of the United States

October Term, 1984

JERRY CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Is a defendant entitled to production at trial of prior statements by government witnesses made to Canadian authorities during the course of a joint Canadian-American criminal investigation and kept in the custody of the Canadian authorities?

PARTIES TO THE PROCEEDING

Petitioner Jerry Carter was one of four co-appellants. The other appellants in the Court of Appeals were Osvaldo Paternina-Vergara, Justino Reyes and Juan Ganen.

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No.

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October Term, 1984

JERRY CARTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, The Chief Justice of the United States and Associate Justices of the United States Supreme Court

The petitioner, Jerry Carter, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its judgment and opinion at Number 84-1187.

OPINION BELOW

The opinion and judgment of the Court of Appeals for the Second Circuit, which has not yet been reported, was filed on November 30, 1984. It is reproduced at 1a.*

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit affirming petitioner's conviction was filed on November 30, 1984 and is set forth in the Appendix.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

United States Code, Title 18, Section 3500.

STATEMENT OF THE CASE

Petitioner was convicted after a trial by jury in the Western District of New York of one count of conspiracy to distribute cocaine in violation of Title 21 U.S.C. Section 841(a)(1) and 846, one count of possession with intent to distribute cocaine in violation of Title 21 U.S.C. Section 841(a)(1), and two counts of using a communications facility, a telephone, to facilitate the commission of a narcotics felony in violation of Title 21 U.S.C. Sections 841(a)(1) and 843(b). Petitioner was sentenced to a term of ten years imprisonment on the conspiracy count, to a term of ten years imprisonment and six years special parole on the distribution count, and to terms of four years imprisonment on

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* References are to pages of the appendix annexed to the petition.

each of the telephone counts, all of the prison sentences to be served concurrently. The execution of the sentence has been stayed by the trial court until January 22, 1985.

Three co-defendants, Paternina-Vergara, Reyes and Ganen, were also convicted of the conspiracy and distribution charges. Ganen, in addition, was also convicted of two counts of using a telephone to facilitate a narcotics felony.

In February 1983 the Royal Canadian Mounted Police ("RCMP") were approached by an informant previously unknown to them who volunteered to provide information and evidence concerning criminal acts by the petitioner and his associates. The RCMP thereupon initiated an undercover investigation. The informant was to be rewarded commensurate with the success of the investigation. An RCMP officer was assigned to pose as a Canadian organized crime figure interested in purchasing large quantities of cocaine.

Shortly after the investigation began, it appeared that the locus of the investigation was to be the United States. At that point, the United States Drug Enforcement Agency ("DEA") was contacted by the Canadian authorities and assumed the supervision of the investigation. While the informant and the RCMP officer continued in their undercover roles, the DEA provided direction of the investigation, including surveillance, security and strategic planning.

A series of meetings was held between the defendants and the undercover agents — in Toronto, Canada; West Palm Beach and Ft. Lauderdale, Florida; and Buffalo, New York. In addition there were numerous phone calls between petitioner and the informant. Eventually, fifteen kilograms of cocaine were delivered to the undercover agents in Buffalo, and the defendants — all of whom were present or in the vicinity — were arrested.

Petitioner's defense was that he was entrapped and coerced into securing the cocaine that was eventually delivered. He sought to establish that the government — through its Canadian agents — induced petitioner to secure narcotics through promises of financial gain, and threats of severe economic loss and even of death. Thus, the sole contested issue at trial was whether the actions of the Canadian agents induced a person not otherwise predisposed to commit a crime to be involved in a narcotics conspiracy.

Not suprisingly, in contrast to petitioner's testimony, the Canadian undercover agents testified that they never made any such inducements or threats. Accordingly, the reports and notes prepared by the RCMP officers, which covered the early stage of the investigation and which potentially included impeachment material, became vital to the defense. Thus, during the trial the defense sought their production under the Jencks Act, 18 U.S.C. Section 3500.

The request by the defense to see the statements, which were in the custody of the RCMP, was rejected by the Canadian authorities. Instead, the RCMP allowed the Assistant United States Attorney ("AUSA") to see the documents in Canada. The AUSA traveled to Canada, reviewed the statements, made summaries and copies of what he believed was relevant to the defense, and provided these to the defense.

REASONS FOR GRANTING THE WRIT

The Court of Appeals held that the good-faith effort of the AUSA to provide the defense with the material sought was sufficient. It stated:

> We believe that even in the course of a joint investigation undertaken by United States and foreign law enforcement officials the most the

> Jencks Act requires of United States officials is a good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government.

Opinion at 9a.

In its ruling, the Court of Appeals explicitly found that the Canadian authorities were not "agents of the United States for purposes of the Jencks Act." Opinion at 10a. Thus, under this ruling, whether the defendant is entitled to production of Jencks-type material made in the course of a joint investigation essentially depends on which government has custody of the material. Such a criterion, it is submitted respectfully, is arbitrary and irrational and holds vast potential for abuse.

The Court of Appeals recognized that "the investigation of crime increasingly requires the cooperation of foreign and United States law enforcement officials . . . " Opinion at 9a-10a. Such cooperation should require the foreign government to make available to the defense Jencks-type material when trial is held in an American court. Just as the two governments are partners in the investigation, they should be considered partners for Jencks Act purposes.

The importance of such material to a criminal defendant is well-known. As this Court has noted, in the case from which Section 3500 evolved, "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory." *Jencks v. United States*, 353 U.S. 657 at 667 (1957).

A good-faith effort of a prosecutor to secure such material held by a foreign government should not be considered sufficient. Such a request will often either be rejected outright, or, as here,

complied with only in a limited manner which is of little help to the defense. The defense should not be required to rely on the prosecution, no matter how well-intentioned, to summarize and select what material is helpful to the defense. As this Court stated in *Jencks*:

> Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

353 U.S. at 668-69.

The issue presented — under what circumstances a defendant is entitled to production of prior statements made by government witnesses to foreign officials during the course of a joint investigation — has assumed great importance because of the increasing number of indictments and trials resulting from binational investigations. The importance of this issue justifies this Court's granting the petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Attorneys for Petitioner

January 18, 1985

APPENDIX

JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 330, 331, 332, 333 — August Term, 1984

(Argued: October 16, 1984 Decided: November 30, 1984)

Docket Nos. 84-1185, 84-1186, 84-1187, 84-1188

UNITED STATES OF AMERICA,

Appellee,

v.

OSVALDO PATERNINA-VERGARA, JUSTINO REYES, JERRY CARTER and JUAN GANEN,

Defendants-Appellants.

Before:

NEWMAN, CARDAMONE, and DAVIS,* *Circuit Judges.*

Appeal from judgments of the District Court for the Western District of New York (John T. Curtin, *Chief Judge*) convicting defendants, after a jury trial, of cocaine distribution and conspiracy in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982).

Affirmed.

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* The Honorable Oscar H. Davis of the United States Court of Appeals for the Federal Circuit, sitting by designation.

EDITOR'S NOTE

PAGES 2a thru 13a WERE POOR HARD COPY AT THE TIME OF FILMLNG. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Richard A. Rehbock, New York, N.Y., *for defendant-appellant Paternina-Vergara.*

Nicholas J. Stroumtsos, Jr., New Brunswick, N.J. (Roger W. Daley, New Brunswick, N.J., on the brief), *for defendant-appellant Reyes.*

Frederick P. Hafetz, New York, N.Y. (Lawrence S. Goldman, Jay K. Goldberg, Goldman & Hafetz, New York, N.Y., on the brief), *for defendant-appellant Carter.*

Patrick J. Baker, Buffalo, N.Y., for *defendant-appellant Ganen.*

Mathew J. Murphy III, Asst. U.S. Atty., Buffalo, N.Y. (Salvatore R. Martoche, US. Atty., Buffalo, N.Y., on the brief), *for appellee.*

JON O. NEWMAN, *Circuit Judge:*

Osvaldo Paternina-Vergara, Justino Reyes, Jerry Carter, and Juan Ganen appeal from judgments entered in the District Court for the Western District of New York (John T. Curtin, *Chief Judge*) convicting them, after a jury trial, of cocaine distribution and conspiracy in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982). Their principal claim on appeal is that the Jencks Act, 18 U.S.C. § 3500, required production of documents in the possession of foreign law enforcement officials. For the reasons that follow, we affirm.

Judgment and Order

BACKGROUND

Appellants were the subjects of an undercover investigation begun by the Royal Canadian Mounted Police (RCMP) and later directed by the United States Drug Enforcement Agency (DEA). The operation began in February 1983 when Robert Stadel, a Canadian citizen who had engaged in various business deals with appellant Carter, approached the RCMP and suggested that he could provide information about the criminal activities of Carter's business associates, the Ganen family of Miami, Florida. The RCMP hired Stadel and pursued an investigation. RCMP Corporal Gerald Froud was assigned to pose as a Canadian citizen interested in purchasing cocaine for a nationwide distribution network.

Stadel and Froud held a series of meetings with appellants to arrange for the sale of the cocaine. Carter met with the agents in Toronto in March 1983 and discussed the sale of thirty to fifty kilograms of cocaine at a price of $46,000 per kilo. Carter and appellant Ganen met with the agents in West Palm Beach, Florida, on April 16, 1983, and discussed the possibility of increasing the quantity of cocaine to 100 kilos. At a second West Palm Beach meeting two days later, Carter and Ganen were accompanied by appellant Paternina-Vergara, who was described by Ganen as "my partner." Carter and Ganen met the agents again on April 19, 1983, at the Fort Lauderdale airport, where Carter handed Stadel a small business card case containing approximately one-half gram of cocaine.

Stadel and Froud remained in contact with Carter during the following weeks, while delivery of the cocaine was delayed. On April 25, the RCMP agents and an

undercover DEA agent took Carter to a public storage area where they showed him the $4.6 million in cash with which they intended to purchase the cocaine. Carter informed Froud on May 5 that the initial shipment of 15 kilos would arrive on Saturday, May 7. DEA surveillance units took up positions near room 179 of the Executive Hotel in Cheektowaga, New York, on the afternoon of May 7. Sometime after 6:00 p.m. a white Plymouth Reliant arrived at the hotel. Appellant Reyes was the driver of the car, and Paternina-Vergara was a passenger. Ganen left room 179, met Reyes and Paternina-Vergara, and led them back to the hotel room.

At about 6:20 p.m., Froud, DEA Agent Kenneth Peterson, and Stadel went to room 179. Ganen assured them that everything was ready. Froud asked when the other thirty-five kilos would arrive; Paternina-Vergara replied, "Monday." Peterson asked whether it was all right to speak in front of Reyes, and Ganen replied that it was. Before leaving the room, Froud asked Reyes if the thirty-five was coming on Monday. Reyes nodded his head affirmatively. Paternina-Vergara, Ganen, Peterson, and Froud then left the room to examine the cocaine.

Outside, Paternina-Vergara opened the trunk of the Reliant, which contained two cardboard boxes. After opening the boxes and examining the cocaine, the group walked across the parking lot. Once out of sight of room 179, Paternina-Vergara and Ganen were arrested. They were advised of their rights by a DEA agent. Froud and Peterson returned to room 179, where they arrested Reyes and Carter. Both suspects were advised of their rights. All four of the appellants made post-arrest statements to the authorities.

Judgment and Order

DISCUSSION

I.

Appellants first contend that in the circumstances of this case the Jencks Act required the prosecutor to provide them with documents in the possession of Canadian law enforcement officials. Prior to trial, the Government made various investigative materials available to defense counsel. These materials included RCMP tape recordings of meetings and telephone calls between Froud, Stadel, and Carter and notebooks containing notes of meetings made by both Froud and Stadel. During the cross-examination of Froud, one of the defense counsel requested access to RCMP reports of interviews in which Froud had participated. The District Court directed Froud to request that his superiors permit access to the reports. The following day the Assistant United States Attorney (AUSA) trying the case advised the Court that he had been in contact with the RCMP and the Canadian Department of Justice. The Canadian authorities would permit the AUSA to review the documents, but only in Canada; they would permit disclosure of relevant documents only with the permission of RCMP Headquarters. The trial was adjourned pending the AUSA's review of the documents. The District Judge declined an invitation to accompany the AUSA to Canada to review the documents.

The AUSA reviewed every document in the RCMP's investigative file. He photocopied, copied verbatim, or summarized all reports of contacts between Stadel, RCMP officers, and the targets of the investigation. He did not, however, copy or summarize the administrative documents in the files. The Canadian authorities refused to permit

defense counsel access to all the records, but defense counsel received the summaries, verbatim notes, and photocopies made by the AUSA of documents in the investigative file. The District Court found that the Canadian documents were not under the control of the prosecutor and that Froud, although he was working in cooperation with United States law enforcement officials, was not their agent. The Court ruled that the prosecution need not produce the Canadian documents and denied a defense motion to strike the testimony of the RCMP officers and of Stadel.

There is no doubt that the Government made substantial, good-faith disclosures under the Jencks Act. The Government disclosed all documents relating to this case that were ever in its own files. Moreover, the Government made available to defense counsel various materials in the possession of Canadian authorities, including the notebooks of the RCMP undercover officer, Froud, the daily diaries of the two RCMP officers assigned to the investigation, all original tape recordings of telephone conversations and meetings made as part of the investigation, and the notebook of the informant, Stadel. In fact, the only documents in the possession of the RCMP not produced or summarized by the AUSA were asserted to be administrative in nature and therefore arguably not "relate[d] to the subject matter as to which the witness has testified" within the meaning of 18 U.S.C. § 3500(b).[1] *See United States* v. *Augello*, 451 F.2d

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[1] The Jencks Act provides, in relevant part:

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of

[Footnote continued on following page]

1167, 1170 (2d Cir. 1971), *cert. denied*, 405 U.S. 1070 (1972). Nonetheless, for purposes of this appeal, we will assume, without deciding, that the documents not disclosed to defense counsel would have been subject to Jencks Act disclosure had the documents been in the files of United States law enforcement authorities.

The relevant language of the Jencks Act requires the United States to produce any pertinent statement of a prosecution witness "in the possession of the United States." 18 U.S.C. § 3500(b). We must decide whether the documents at issue, though in the physical possession of Canadian authorities, are nonetheless in the possession of the United States within the contemplation of the Act because the DEA directed the criminal investigation after the focus of the conspiracy shifted to the United States. Appellants contend that the documents are being held by the "agents" of the United States and therefore are in the constructive possession of the United States for purposes of the Act. Appellants point to the evidence of close cooperation between the United States and Canadian authorities, including American control of the later stages of the investigation.

The issue whether the Jencks Act applies in a federal prosecution to documents in the possession of a government other than the United States has thus far arisen primarily with regard to documents generated and held by *state* law enforcement officials. We have ruled that

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[Footnote continued from previous page]

> the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(b) (1982).

documents of local police are not subject to the Jencks Act, at least in the absence of a joint federal-state investigation. *United States* v. *Bermudez*, 526 F.2d 89, 100 & 100 n.9 (2d Cir. 1975), *cert. denied*, 426 U.S. 970 (1976); *see United States* v. *Higginbotham*, 539 F.2d 17, 21 (9th Cir. 1976); *United States* v. *Smith*, 433 F.2d 1266, 1269 (5th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971). The Tenth Circuit has reached the opposite result, expressing the view that it will not permit the Government to "stand on technicality" and assert lack of "actual possession" as a basis for resisting a demand for disclosure of statements made to state officers. *United States* v. *Heath*, 580 F.2d 1011, 1018-19 (10th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979). However, *Heath* appears to be qualified by two circumstances: The federal prosecutor had assured the trial court that he would assume responsibility for obtaining statements in the possession of state officials and there had been close cooperation between federal and state officials. *Id.* at 1018, 1019 n.1. Our *Bermudez* decision appears to reserve the issue of Jencks Act coverage for documents in custody of state officials working in cooperation with federal officials. At least one court has considered such cooperation an insufficient basis for applying the Jencks Act to documents held by local police officers. *United States* v. *Harris*, 368 F. Supp. 697, 709 (E.D. Pa. 1973), *aff'd without consideration of this point*, 498 F.2d 1164 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974).

The one decision that squarely considered application of the Jencks Act to documents in the possession of a *foreign* government ruled the Act inapplicable. *United States* v. *Friedman*, 593 F.2d 109, 120 (9th Cir. 1979). *Cf. United States* v. *Flores*, 540 F.2d 432, 437 (9th Cir. 1976) (documents in possession of Mexican government

not discoverable pursuant to Fed. R. Crim. P. 16(b); *United States* v. *Cotroni*, 527 F.2d 708 (2d Cir. 1975) (federal wiretapping statute, 18 U.S.C. § 2510, inapplicable to communications intercepted by Canadian officials in Canada), *cert. denied*, 426 U.S. 906 (1976).

If there had been no cooperation between Canadian and United States officials in the pending case, we would not hesitate to follow the Ninth Circuit's *Friedman* decision and apply in the foreign context the ruling we made in *Bermudez* in the state context. The fact of cooperation, however, makes the issue somewhat closer. *See United States* v. *Bermudez*, *supra*, 526 F.2d at 100 n.9. We have previously explicitly reserved decision on the extent to which cooperation with foreign law enforcement officials may implicate *constitutional* restrictions, either on the theory that foreign officials were agents of American authorities, *see United States* v. *Busic*, 592 F.2d 13, 23 n.7 (2d Cir. 1978), or on the theory that a joint investigation might afford an opportunity for evading constitutional requirements applicable to United States officials. *see United States* v. *Bagaric*, 706 F.2d 42, 69 (2d Cir.), *cert. denied*, 104 S. Ct. 134 (1983). And our decision in *Cotroni* may fairly be read to reserve the issue of the use of wiretap evidence when American officials participate with foreign officials conducting the taps. 527 F.2d at 712.

We believe that even in the course of a joint investigation undertaken by United States and foreign law enforcement officials the most the Jencks Act requires of United States officials is a good-faith effort to obtain the statements of prosecution witnesses in the possession of the foreign government. The investigation of crime increasingly requires the cooperation of foreign and United

States law enforcement officials, but there is no reason to think that Congress expected that such cooperation would constitute the foreign officials as agents of the United States for purposes of the Jencks Act. In this case, the prosecutor's good faith in his efforts to secure Canadian documents is manifest. He secured copies of numerous documents and made summaries of others. Whatever was withheld reflects the preference of the Canadian authorities, not the reluctance of the United States authorities. In the circumstances of this case, the Jencks Act did not require either production of the withheld documents or any limitation on the testimony of the Canadian witnesses.[2] We are not confronted with a situation where United States officials attended an interview of a prosecution witness and made no report of the interview, preferring a report to be made by a foreign official in the hope of avoiding Jencks Act production.

There is no merit to appellants' contention that the trial judge was obliged to travel to Canada to review the documents. No circumstance required him to inspect the documents, and his refusal to review them in Canada was not an abuse of discretion. *See United States* v. *Cotroni, supra*, 527 F.2d at 712.

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[2] We are unpersuaded by appellants' argument that a written agreement between the RCMP and the DEA, which expressly mentions the Jencks Act, somehow imposes a stricter standard of compliance with the Act. Paragraph 9 of the agreement, upon which the appellants rely, states in its entirety: "If correspondence from the [RCMP] is required in a United States court under the 'Jenks' [*sic*] law, the DEA will notify the [RCMP] as soon as possible." This paragraph does not extend the reach of the Jencks Act. Moreover, the agreement itself appears to contemplate the type of arrangements undertaken in this case. Paragraph 10 reads: "The DEA may not use correspondence from the [RCMP] for court purposes without the express permission of [RCMP] Headquarters."

II.

Paternina-Vergara contends that he was impermissibly inculpated by the admission of portions of Reyes' post-arrest statement in violation of the rule of *Bruton* v. *United States*, 391 U.S. 123 (1968), which bars use at a joint trial of a non-testifying defendant's confession that inculpates a co-defendant, even if offered only against the declarant. The *Bruton* rule is not violated, however, when a co-defendant's confession is so similar to the defendant's confession that the two statements "interlock." *Parker* v. *Randolph*, 442 U.S. 62, 72-75 (1979); *United States ex rel. Catanzaro* v. *Mancusi*, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970).

> This [interlocking confession] doctrine does not require identity in statements. *United States ex rel. Ortiz* v. *Fritz*, 476 F.2d 37, 39 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973). It is sufficient if the confessions are "substantially the same and consistent on the major elements of the crime involved." *United States ex rel. Stanbridge* v. *Zelker*, 514 F.2d 45, 49 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975). Essentially, to be interlocking, the statements must describe the same crime. *United States* v. *Fleming*, 594 F.2d 598, 604 (7th Cir.), *cert. denied*, 442 U.S. 931 (1979).

Tamilio v. *Fogg*, 713 F.2d 18, 20 (2d Cir. 1983) (parallel citations omitted), *cert. denied*, 104 S. Ct. 706 (1984).

Applying this standard, we conclude that the statements of Reyes and Paternina-Vergara are interlocking despite some inconsistency as to details. We reject Paternina-Vergara's claim that Reyes' statement provided the only unequivocal evidence that Paternina-Vergara knew

that he was transporting cocaine. In his own statement he provided evidence of his knowledge by stating that he was acting only as a transporter of narcotics and that he could not identify his source for fear of reprisal. Reyes' statement was surely not devastating to Paternina-Vergara in view of his pre-arrest statements to Froud that the other thirty-five kilos would be ready on Monday and that he could supply Froud with up to 200 kilos.

Paternina-Vergara also argues that, even if Reyes' statement could be used at a joint trial, the District Judge should have given a limiting instruction to the jury at the time of the admission of the statement, in addition to the limiting instruction that was included in the jury charge. Though not required by case law, a contemporaneous limiting instruction as to an interlocking confession admitted at a joint trial is advisable to guard against improper consideration against a co-defendant of a statement received in evidence as an exception to the *Bruton* rule. However, in the absence of a request by defense counsel, the lack of a contemporaneous limiting instruction was not error at all, much less a ground for reversal.

III.

Appellant Reyes contends that the arresting officers did not have probable cause to arrest him and that his post-arrest confession should therefore have been suppressed. He bases this argument on the dubious assertion that nodding his head affirmatively in response to the question whether the thirty-five kilos would be ready Monday was an insufficient indication that he knew a drug transaction was taking place at the Executive Hotel. The District Court, however, did not rely on this fact alone but bases its finding of probable cause primarily

on three other facts: (1) Reyes arrived at the Executive Hotel with Paternina-Vergara in the automobile in which the cocaine was transported; (2) Reyes was present during conversations regarding the manner of delivery of the cocaine; and (3) Ganen indicated to a DEA agent that it was all right to speak in front of Reyes. These facts, together with Reyes' affirmative nod, were sufficient to permit an officer reasonably to conclude that Reyes was involved in the illegal transaction. *See Brinegar* v. *United States*, 338 U.S. 160, 175 (1949) ("In dealing with probable cause, . . . we deal with probabilities.").

IV.

Chief Judge Curtin denied Reyes' severance motion because he determined that the confessions of Reyes and Paternina-Vergara were interlocking within the meaning of *Parker* v. *Randolph*, *supra*. Because we agree with this holding and because Reyes did not suffer substantial prejudice by reason of the joint trial, we conclude that the denial of the severance motion was not an abuse of discretion. *United States* v. *Ventura*, 724 F.2d 305, 312 (2d Cir. 1983); *United States* v. *Weisman*, 624 F.2d 1118, 1129-30 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980).

For the foregoing reasons, the judgments of conviction are affirmed. The mandate shall issue forthwith.

Judgment and Order

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Filed Nov. 30, 1984
Elaine B. Goldsmith, Clerk

WDNY
CR 83 84 1
DC-J. Curtin

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of November one thousand nine hundred and eighty-four.

Present:

Hon. Jon O. Newman

Hon. Richard J. Cardamone

Hon. Oscar H. Davis*

Circuit Judges

84-1185, 84-1186, 84-1187, 84-1188

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* of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Judgment and Order

UNITED STATES OF AMERICA,

Appellee,

v.

OSVALDO PATERNINA-VERGARA, JUSTINO REYES, JERRY CARTER and JUAN GANEN,

Defendants-Appellants.

Appeals from the United States District Court for the Western District of New York

These causes came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

Elaine B. Goldsmith
Clerk

Edward Guardaro
Deputy Clerk

s/ Francis X. Gindhart
Chief Deputy Clerk

18 U.S.C. SECTION 3500

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the posession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall

be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.